

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA**

BURCHICK CONSTRUCTION COMPANY,)
INC.,)
)
Plaintiff,) Civil Docket No. 05-CV-12E
)
vs.)
)
HBE CORPORATION,) Judge McLaughlin
)
Defendant.) (Electronically Filed)

**PLAINTIFF, BURCHICK CONSTRUCTION COMPANY, INC.'S
REPLY AND AFFIRMATIVE DEFENSES TO AMENDED COUNTERCLAIM FILED
BY DEFENDANT, HBE CORPORATION**

AND NOW comes Plaintiff, Burchick Construction Company, Inc. ("Burchick"), by its undersigned counsel, Reed Smith LLP, and files this Reply and Affirmative Defenses to the Amended Counterclaim filed by Defendant HBE Corporation ("HBE"), as follows:

23. The averments of paragraph 23 are admitted with the clarification that Subcontract No. 03330-5187 is dated August 14, 2002.

24. The averments of paragraph 24 are admitted with the clarification that Subcontract No. 03330-5195 is dated August 16, 2002.

25. The averments of paragraph 25 are denied. By way of further answer, Burchick performed all work required under Subcontract No. 03330-5187 in conformance with the

requirements of that contract, including all applicable plans, drawings or specifications and otherwise performed all work in a proper and workmanlike manner.

26. The averments of paragraph 26 are denied.

27. The averments of paragraph 27 are denied.

28. Burchick is without knowledge or information sufficient upon which to form a belief as to whether HBE expended monies in the amount of \$73,140.00, related to alleged Burchick deficiency items. However, it is denied that any of Burchick's work under either Subcontract No. 03330-5187 or Subcontract No. 03330-5195 was deficient, non-conforming, defective or otherwise not in accord with applicable contract requirements.

29. The averments of paragraph 29 are denied. By way of further answer, HBE has no right to backcharge Burchick.

30. The averments of paragraph 30 are denied as stated. By way of further answer, Subcontract No. 03330-5187 and Subcontract No. 03330-5195 are writings, speak for themselves, and consequently, any contrary or inconsistent averments contained in paragraph 30 are denied.

31. The averments contained in paragraph 31 are denied as stated. By way of further answer, Subcontract No. 03330-5187 and Subcontract No. 03330-5195 are writings, speak for themselves, and consequently, any contrary or inconsistent averments contained in paragraph 31 are denied.

32. The averments of paragraph 32 are denied as stated. The OCIP credit owed from Burchick to HBE was included and reflected in the consideration for each of Subcontract No. 03330-5187 and Subcontract No. 03330-5195. Further, it is admitted under the terms of Subcontract Nos. 03330-5187 and 03330-5195, Burchick was to provide certain monthly hour

information. By way of further answer, Burchick did supply all monthly hour information required by the subcontracts or as otherwise directed by HBE. The remaining averments of paragraph 32 are denied. By way of further answer, Subcontract No. 03330-5187 and Subcontract No. 03330-5195 are writings, speak for themselves, and consequently, any contrary or inconsistent averments contained in paragraph 32 are denied.

33. The averments of paragraph 33 are denied. To the contrary, Burchick has supplied all certified hour information required by HBE.

34. The averments of paragraph 34 are admitted in part and denied in part. Specifically, with respect to Subcontract No. 03330-5195, HBE instructed Burchick not to submit certified hours worked information, but rather, to submit hours worked information on forms supplied by HBE, which Burchick did every month in accordance with HBE's instructions and the requirements of Subcontract No. 03330-5195.

35. The averments of paragraph 35 are admitted in part and denied in part. By way of further answer, Burchick is submitting certain insurance information in connection with responses to discovery propounded upon Burchick by HBE. Burchick has not submitted other "updated insurance rating information" as Burchick is under no obligation to supply proprietary and confidential insurance-related information not required under Subcontract No. 03330-5187 or Subcontract No. 03330-5195.

36. The averments of paragraph 36 are denied, Burchick has submitted all required information and no additional "OCIP credit" is owed by Burchick to HBE.

AMENDED COUNTERCLAIM – COUNT 1

37. Burchick incorporates by reference, the same as if set forth at length herein, paragraphs 23 through 36 above.

38. The averments of paragraph 38 are denied.

39. Burchick denies that HBE is entitled to any setoff against the amounts owed Burchick by HBE.

AMENDED COUNTERCLAIM – COUNT 2

40. Burchick incorporates by reference, the same as if set forth at length herein, paragraphs 23 through 39 above.

41. Burchick denies that HBE has incurred any alleged damages, that HBE is entitled to recoupment, backcharge, deduction or setoff, or that HBE is entitled to a judgment in HBE's favor.

AFFIRMATIVE DEFENSES

42. HBE's counterclaim fails to state a claim upon which relief may be granted.

43. HBE's counterclaim is barred by waiver.

44. HBE's counterclaim is barred by estoppel.

45. HBE's counterclaim is barred by release.

46. HBE's counterclaim is barred by the doctrine of accord and satisfaction.

47. HBE's counterclaim is barred by the doctrine of laches.

48. HBE's counterclaim is barred by operation of the Contractor and Subcontractor Payment Act, 73 P.S. § 501 et.seq.

WHEREFORE, Burchick demands that judgment be entered in its favor and against Defendant HBE on the Plaintiff's Complaint and on the Defendant's Amended Counterclaims.

Respectfully submitted,

s/Kurt F. Fernsler

Kurt F. Fernsler, Esquire

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Plaintiff Burchick Construction Company, Inc.'s Answer to Amended Counterclaim was served this 25 day of October, 2005, electronically via the Court's ECF system:

Michael D. Glass, Esquire
John H. Riordan, Esquire
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s/Kurt F. Fernsler
Kurt F. Fernsler